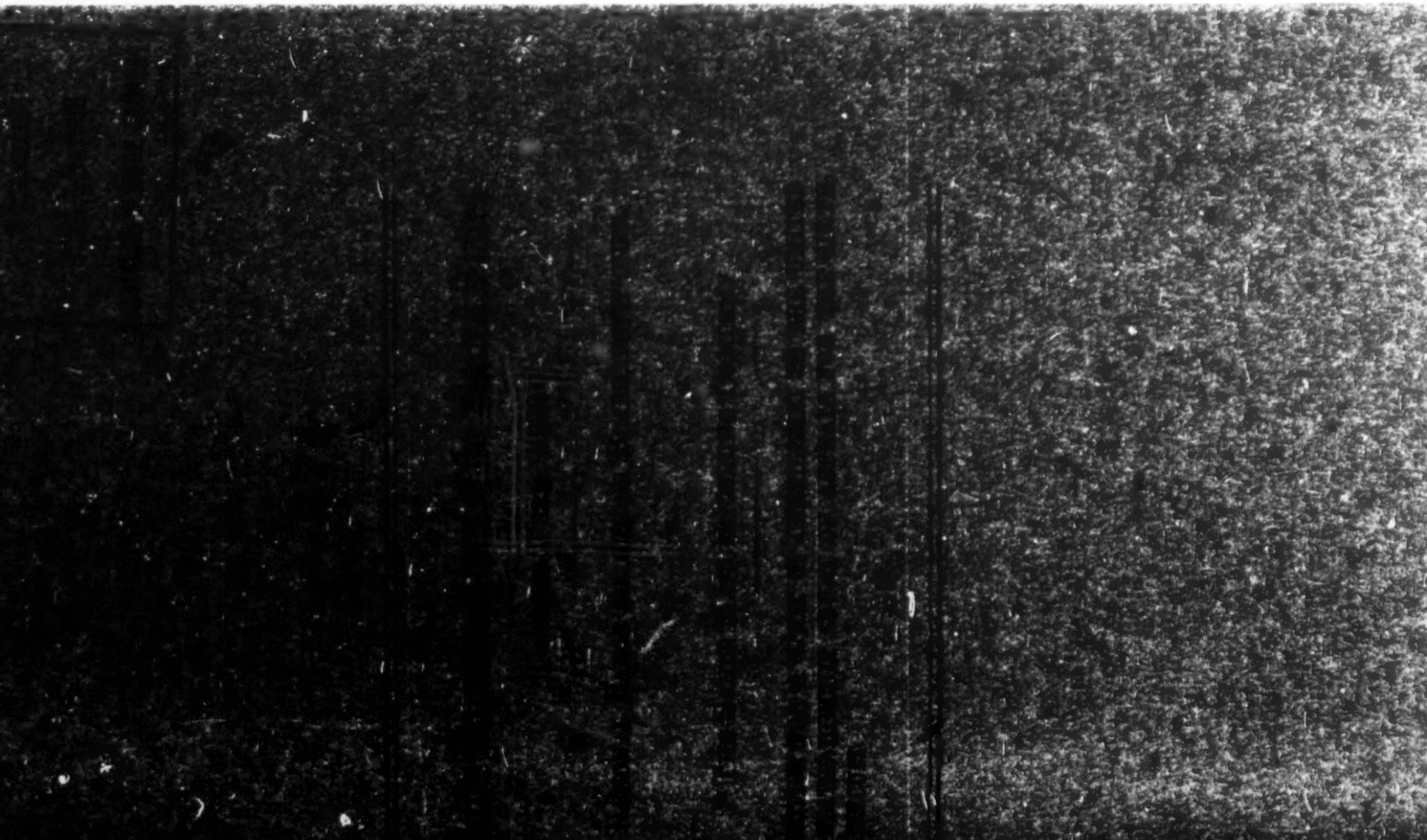

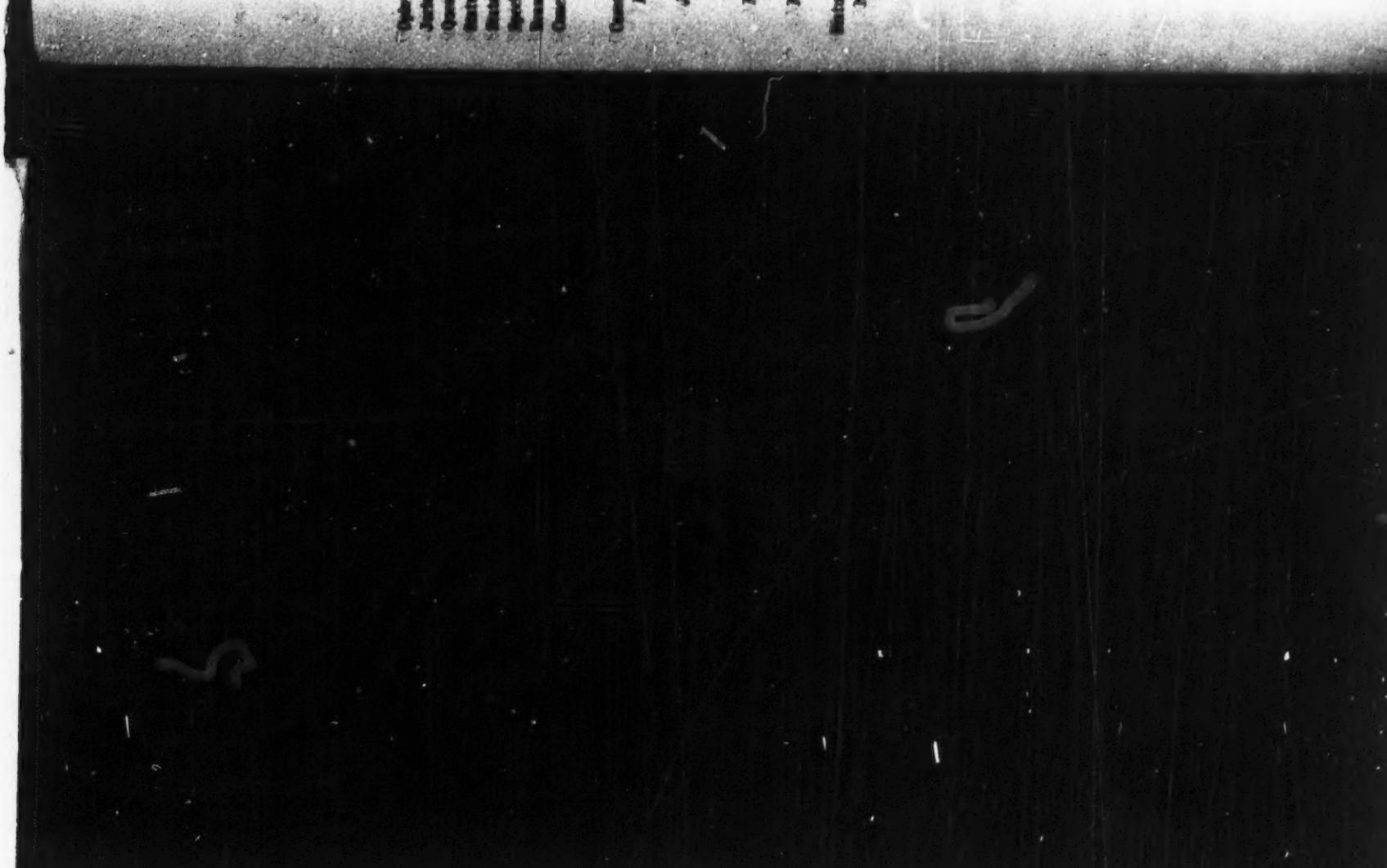

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE SANDS MANUFACTURING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered on May 13, 1938 (R. 607), denying the petition of the National Labor Relations Board for the enforcement of its order against The Sands Manufacturing Company.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 25–42) are reported in 1 N. L. R. B. 546. The opinion of the Circuit Court of Appeals (R. 607–614) is reported in 96 F. (2d) 721.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 13, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the duty of respondent under Section 8 (5) of the Act to bargain collectively with its employees obligated respondent, after prior negotiations had resulted at most in a temporary impasse, to resume negotiations when circumstances had so changed that a settlement of the dispute might reasonably have been expected.

2. Whether there was evidence to support the finding of the Board that certain employees of the respondent were refused reinstatement because they were members of a particular labor organization and had engaged in concerted activities for the purpose of collective bargaining.

3. Whether respondent violated Section 8 (3) of the Act in offering to reinstate certain employees only on condition that they join a particular labor organization, although respondent had no closed shop agreement with that labor organization.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat.

449, U. S. C., Supp. II, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

SEC. 10.

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

Pursuant to Section 10 (b) of the National Labor Relations Act, the National Labor Relations Board, on November 12, 1935, issued a complaint and notice of hearing, which were duly served upon respondent (R. 7–11). The complaint alleged, in substance, that respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subdivisions (1), (3) and (5) of the Act. An answer was filed by respondent on November 20, 1935 (R. 11–24). A hearing was held from November 25 through November 30, 1935, before a Trial Examiner duly designated by the Board. Thereafter the Trial Examiner filed an intermediate report (R. 42–60), containing his findings and recommendations, to which exceptions were filed by the parties (R. 27, 63–99). Oral argument was had before the Board and respondent filed a brief in support of its position (R. 27). On April 17, 1936, the Board issued its findings of fact, conclusions of law, and order (R. 25–42). The facts, as found by the Board and supported by the evidence, may be summarized as follows:

Respondent is engaged at Cleveland, Ohio, in the manufacture, sale and distribution of gas and kerosene water heaters and is extensively engaged in interstate commerce (R. 28). In 1934, practically all of respondent's production and maintenance employees, who constitute a unit appropriate for the purposes of collective bargaining, were members of Mechanics Educational Society

of America, a labor organization hereinafter termed the M. E. S. A. (R. 28–29, 122–123, 128). After two strikes, respondent and the M. E. S. A. entered into a contract dated June 15, 1935, which contained the following provisions (R. 29–31, 600):

> 5. That when employees are laid off, seniority rights shall rule, and by departments.
>
> 6. That when one department is shut down, men from this department will not be transferred or work in other departments until all old men only within that department, who were laid off, have been called back.
>
> 7. That all new employees be laid off before any old employees, in order to guarantee if possible at least one week's full time before the working week is reduced to three days.[1]

On June 15, 1935, and at all times thereafter the M. E. S. A. represented a majority of the employees in the appropriate unit (R. 30, 232, 234).

At the beginning of August 1935 the plant was being operated by "old" men on a schedule of 3 days a week (R. 30, 428–429). Respondent desired to shut down all departments of the plant except the machine shop, where the operating force

[1] Throughout the record, the Board's decision and the opinion of the court the term "old" employees refers to men employed by respondent prior to the temporary expansion of its personnel in the fall of 1934 to fill an order placed by the United States Government. "New" employees were those hired to work on that order and those hired thereafter.

as to be increased; a disagreement arose between spondent and the M. E. S. A. as to whether the greement provided that respondent might recall new" hands to work in the machine shop while old" employees were idle because of the shut- own of their departments (R. 31, 34–35, 371–372, 0–471, 555–556). Conferences were held and ntinued until August 19, 1935, but no resolution the disagreement was reached. On August 19, arry Sands, respondent's secretary-treasurer, ked the M. E. S. A. committee to consult the men ascertain whether they preferred that the entire ant be temporarily shut down rather than that e machine shop force be increased with "new" en (R. 31–32, 375–377, 572). The men preferred e former alternative and on August 21 respond- t posted a notice that the plant was closed "until rther notice" (R. 32, 351, 377, 433).

Respondent's desire to use additional "new" en in the machine shop was attributable to the ct that wage rates were determined wholly by ngth of service in the plant and the new men ould accordingly receive a lower wage than the old" employees (R. 36, 372–373, 375–376, 572). otwithstanding the fact that a general wage re- uction was neither proposed by respondent nor scussed at the conferences with the M. E. S. A. ring July and August, respondent, without noti- ing the M. E. S. A., approached the International ssociation of Machinists, another labor organiza-

tion, on August 26 or 27 and negotiated a contract, effective September 3, at a lower wage scale than it had operated with the M. E. S. A. (R. 32, 37–38, 22, 451–452, 546–547). "New" men who were members of the Machinists were notified to report for work and further help was obtained through the Machinists and from the county relief roles (R. 32, 452–453, 509). Only 4 of the 32 "old" employees who were members of the M. E. S. A. were notified to return; 2 of them were offered employment upon condition that they join the Machinists, and Sands tried to persuade 3 of them to take wage cuts in return for guarantees of steady work (R. 32–33, 315–316, 329–330, 340–341, 353–356, 522–528). Others of the "old" men who applied for their positions were told that their places were taken (R. 33, 449, 525, 528–529, 535). Sands said that the "old" employees would not be recalled to work because their hourly rates of pay were too high (R. 355–356), but the fact is that 15 "new" men belonged to the M. E. S. A. and none of them was notified to return.

When the plant reopened on September 3, the M. E. S. A. protested the lock-out of its members and asked Sands to meet with the committee, but Sands refused a meeting (R. 33–34, 134–135, 529, 569–570). On September 10, respondent, because of its apprehension that the M. E. S. A. might file charges under the Act, procured a cancellation of its week-old contract with the Machinists, so that no issue is here presented as to the validity of that

contract. However, respondent continued to pay the lower wage scale and otherwise observe the terms of the contract (R. 34, 544–546, 602).[2] There is testimony that Sands intimated that the M. E. S. A. was trying to "break him" (R. 316, 523) and that he pointed out, in rejecting the application of an M. E. S. A. member for reinstatement, that the man had picketed the plant on September 3 and that the M. E. S. A. had filed charges with the Board (R. 397, 529).

The Board found that respondent's failure to bargain with the M. E. S. A. concerning the contract dispute and concerning the new wage issue, which overshadowed all others, violated Section 8 (5) and (1) of the Act, and that by locking out the members of the M. E. S. A. and by imposing membership in the Machinists upon some of them as a condition of reinstatement, respondent had violated Section 8 (3) and (1) of the Act (R. 34–41). The Board accordingly ordered respondent to cease and desist from such unfair labor practices and, as affirmative action necessary to effectuate the policies of the Act, required respondent to reinstate the members of the M. E. S. A. who had been locked

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[2] Garry Sands testified as follows: "I didn't know what would happen if the complaint would be filed upon us, and I thought to myself well what is the use of getting into more difficulties and have two contracts, that I thought it better if I will go down and see if I can get the one contract cancelled and let the other contract take care of itself" (R. 544).

out, with back pay, and to bargain collectively with the M. E. S. A. upon request (R. 41–42).

On June 24, 1937, the Board, pursuant to Section 10 (e) of the Act, filed in the Circuit Court of Appeals for the Sixth Circuit its petition for enforcement of its order. Thereafter respondent filed its cross-petition to review and set aside the order. On May 13, 1938, the court denied the Board's application and set aside the order (R. 607).

The court below rejected as not supported by evidence the Board's findings of fact, supported by the evidence reviewed above, that respondent had abandoned negotiations with the M. E. S. A. and sought out the Machinists at a time when it was under obligation to bargain with the M. E. S. A. as the exclusive representative of its employees (R. 610–613). The court also rejected the Board's conclusion that the merits of the dispute over the interpretation of the contract were irrelevant on the question of the status of the members of M. E. S. A. as employees and respondent's obligation to bargain with them (R. 610–611). It held that the M. E. S. A. had breached the contract by insisting upon an interpretation thereof with which it did not concur, that by virtue of such breach the M. E. S. A. members ceased to be "employees" under the Act and lost all right to further bargaining after respondent had, up to August 21, attempted to persuade them to accept respondent's interpretation of the agreement (R. 611–613). In this view, the court ruled, contrary to the find-

ings and conclusions of the Board (R. 35–39), that the changed conditions after August 21 did not create a situation concerning which respondent was obligated to bargain with the M. E. S. A. as the representative of its employees rather than to bargain with another labor organization which did not represent them (R. 612–613). Ignoring the Board's findings upon evidence (R. 38) that during June and July 1935 respondent had evinced hostility toward the M. E. S. A. and attempted to discourage membership therein, the court held that "the uncontroverted facts as to the complete lack of any attempt to prevent organization or to discourage affiliation with the M. E. S. A." supported its conclusion from the testimony that respondent had in good faith attempted to compose its differences with that union (R. 613). It further held that the Board's finding that the members of the M. E. S. A. had been locked out and discharged by reason of their union affiliation, in violation of Section 8 (3) (R. 613–614), was not supported by evidence and that respondent's imposition of membership in the Machinists as a condition of employment, found by the Board to violate Section 8 (3) (R. 32–33, 39), had "no relation to the controversy here" (R. 614).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that respondent violated the National Labor Relations Act by failing to bargain

collectively with the duly authorized representative of its employees at a time when changed circumstances indicated a reasonable probability that a prior temporary impasse could be resolved through further negotiation.

2. In not holding that the Board's findings that respondent had, following a temporary lay-off of its employees, denied reinstatement to employees by reason of their affiliation with a particular labor organization, was supported by evidence and was therefore conclusive under Section 10 (e) of the Act.

3. In not holding that respondent violated the National Labor Relations Act by offering reinstatement to employees, following a temporary lay-off, upon condition that they join a labor organization which did not have a closed-shop contract with the employer.

4. In not holding that employees who cease work by reason of a temporary lay-off following a temporary impasse in negotiations between their representatives and their employer, remain "employees" for the purposes of the National Labor Relations Act.

5. In denying enforcement to the Board's order.

REASONS FOR GRANTING THE WRIT

I

The decision of the court below in refusing to enforce the order of the Board requiring respondent to cease and desist from its refusal to bargain col-

ctively with the M. E. S. A. is in direct conflict ith the decision of the Circiut Court of Appeals r the Fourth Circuit in *Jeffery-DeWitt Insulator o.* v. *National Labor Relations Board,* 91 F. (2d) 4, certiorari denied, 302 U. S. 731.

In each case the question at issue was the extent f the obligation of the employer to bargain with s employees as required by Section 8 (5) of the ct. In the *Jeffery-DeWitt* case the negotiations ad reached a stalemate on June 20, 1935. Almost month later, on July 15, conciliators from the nited States and the West Virginia Departments f Labor, which had been instrumental in settling revious strikes against the company, offered their rvices as mediators. The refusal of the company reopen the negotiations under these changed cir-mstances was held by the Board to have been a olation of Section 8 (5). The Circuit Court of ppeals, in affirming the order, said (91 F. (2d) 139):

> The company's second contention is that it was not guilty of an unfair labor practice in refusing to bargain with the union on and after July 15th, for the reason that efforts to bargain with it prior to June 20th had resulted in failure and an impasse in the negotiations had been reached. The answer to this is that nearly a month of "cooling time" had elapsed since the negotiations of June 15th to 20th, the status of the controversy had undergone considerable change as a result of the operation of the plant, the

> striking employees after nearly a month of idleness were doubtless willing to make concessions to compromise the matters in difference, and conciliators had arrived upon the scene for the purpose of trying to secure an adjustment.

The instant case presents the same question in a more aggravated form. After several conferences with the representatives of the M. E. S. A. concerning the question of whether "old" or "new" men should work in the machine shop under the contract of June 15, the plant was closed on August 21 under conditions which left the members of M. E. S. A. in the status of employees.[3]

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[3] There is no indication whatsoever in the evidence that this temporary shut-down of the plant was intended or understood as a discharge of the men (see R. 37). Frank Pansky, a member of the M. E. S. A. committee, testified that at the August 19 meeting Sands stated that if respondent's proposed actions were not acceptable to the union, "maybe we will shut down the factory for a week or two until some work comes in, * * *" (R. 376–377). Jindra, another M. E. S. A. representative, quoted Sands as stating that the plant would have to "shut up for two weeks" (R. 572). Sands denied saying anything on August 19 about closing the plant for a week or two, but testified that he directed the Committee to consult the men "and see if they have any suggestions to offer and what we can do about it" and that the Committee returned on August 21 and asked that the plant be shut down and respondent "wait until you get busy so as to take back all the old men" (R. 519–520, 553, 556). Sands thereupon directed the posting of the notice on the time clock that the plant was closed "until further notice" (R. 520, 351).

Nothing, at that time, indicated that a permanent impasse had been reached or that respondent had, because it differed with the M. E. S. A. on the interpretation of the contract, discharged its employees. At that time it was clearly intended by both parties that, through a temporary shut-down, enough orders would accumulate so that all the old men would be employed in their own departments, and the issue in controversy would become moot. It is certainly contrary to the *Jeffery-DeWitt* case to say that, in a situation where both parties intended that all difficulty be resolved through changed circumstances arising with the passage of time, an impasse had been reached which relieved respondent of all duty thereafter to bargain with its employees.

The conflict between the instant decision and that in the *Jeffery-DeWitt* case is actually even clearer than that. The evidence leaves no doubt that the dispute between respondent and M. E. S. A. was a dispute concerning wage rates: reduction in wage costs was the moving cause behind respondent's insistence on its right to hire "new" men (R. 372–373, 376–377, 430–432, 522–523, 572). After the shut-down of the plant a new factor, extremely relevant to this controversy, appeared when respondent manifested, in its offers of reinstatement to four of the "old" employees, a willingness to guarantee steady work in return for a reduction in the hourly rates of pay (R. 37–38,

522–525, 547–548). The Board found upon evidence that there was every reason to suppose that, in negotiations with the M. E. S. A., this offer might have led to a solution of the entire difficulty (R. 38, 316). But respondent never presented the offer to the M. E. S. A.; it settled the controversy in a different way, by bargaining with another union which did not represent its employees and obtaining from that union substantial cuts in wages. Under the rule of the *Jeffery-DeWitt* case, certainly respondent, in the changed circumstances presenting a new issue which created substantial likelihood that the entire conflict could be satisfactorily resolved, was under an obligation to resume its bargaining with the M. E. S. A., discontinued but one week previously.

The court below apparently deemed the *Jeffery-DeWitt* case irrelevant on the ground that here the employees had, by their conduct, broken the contract of June 15, 1935, and that for that reason respondent was justified in discharging them, and was no longer under any obligation to bargain collectively with them. This basis of distinction is without substance.

(a) Whether or not respondent would have been justified in discharging the M. E. S. A. employees, it is plain that the employees had not been discharged at the time respondent undertook to negotiate with the Machinists. They had not been discharged on August 21 and were employees laid

off "until further notice" (*supra*, note 3). Nothing further had occurred which could interrupt the employee status when, shortly after August 21, respondent opened negotiations with the Machinists, signed an agreement with that union, and reopened its plant. Certainly, on the facts here presented it cannot be contended that the old men were discharged until others were actually hired to take their places. But long before that time respondent had negotiated and signed an agreement with the Machinists. While these negotiations were going on the M. E. S. A. was, therefore, still the representative of a majority of the employees of the respondent, and the latter was guilty of a violation of Section 8 (5), as found by the Board, in failing to negotiate with that union.

(b) Nor does the suggestion of the court below, wholly unwarranted on the facts, that the shutdown of August 21 was "equivalent to a strike" (R. 613), help respondent. Whether or not the employees were correct in the position they took on the issue which caused the "strike"—the interpretation of the contract—the "strike" did not, without more, sever the employment relationship under Section 2 (3) of the Act. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 58 S. Ct. 904, 910. The ruling of the court below that the "strike" terminated the employment relations is in conflict with the *Mackay* case and the

clear terms of the Act. The men continued to be employees and the respondent's duty to bargain with them remained unimpaired.

(c) The court below apparently also placed its decision partly on the ground that the breach of contract by the employees justified the respondent in refusing to bargain collectively with them (See R. 610, 613). The Government has pointed out in its petition for certiorari in *National Labor Relations Board* v. *Columbian Enameling and Stamping Co., Inc.*, No. 229, October Term, 1938, that such a holding is plainly unwarranted under the Act. The same arguments are applicable here. We respectfully refer this Court to pages 14 to 22 of the Government's petition in that case.

II

The unfair labor practices under Section 8 (3) in the instant case are very similar to those present in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co., supra.* In each case men, who retained their status as employees during a temporary cessation of work, were refused reinstatement. In each case the basis for the refusal was the union affiliation and activity of the men excluded and the fact that they had engaged in concerted activity for the purposes of collective bargaining.

This Court, in the *Mackay* decision, pointed out clearly that a strike growing out of a labor dispute

id not deprive the employees of the protection of he Act. The court below reached the opposite esult by ignoring positive evidence in the record nd concluding that "no evidence appears" that he employees were refused reinstatement because f their membership in the union.

The Government is aware that error of decision elating to a matter of evidence does not ordinarily ank as a reason for granting a writ of certiorari. t is, however, highly important that the respective unctions of the National Labor Relations Board nd the courts in the administration and enforcement of the National Labor Relations Act be properly delineated, and that effect be given to the xpress statutory declaration that "the findings of he Board as to the facts, if supported by evidence, hall be conclusive." Section 10 (e). As the following review of the evidence will demonstrate, "The Court of Appeals, though professing adherence to this mandate, honored it * * * with ip service only." *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. Circumvention of the express statutory limitation upon the courts' right to review the Board's findings of fact, such as was done by the court below, serves to nullify the statutory provision. This petition for certiorari should be granted in order that this Court, in the exercise of its supervisory powers, and for the guidance of subsequent proceedings in the lower

federal courts, may declare that the mandate of Congress is not to be thus evaded.

With respect to the issue on this branch of the case—the discrimination against the M. E. S. A. members upon the reopening of the plant—the Board found (R. 38–39):

> The whole conduct of the respondent leaves no other reasonable inference than that the old employees were locked out, discharged and refused employment because they were members of the Mechanics Educational Society of America and had engaged in concerted activities for the purpose of collective bargaining.

The court below stated (R. 613):

> In this case no evidence appears that the employees were discharged because of their membership in the M. E. S. A. or any union.

The court below likewise referred to the "uncontroverted facts as to the complete lack of any attempt to prevent organization or to discourage affiliation with the M. E. S. A." (R. 613).

These statements by the court are wholly unjustified on this record. The single circumstance that, after their temporary lay-off because of the shut-down of the plant, the M. E. S. A. employees were not recalled to work, and their positions given to members of the Machinists and persons not previously employed in the plant is, in the absence of explanatory circumstances, cogent evidence that

iliation with the M. E. S. A. was the reason the en here involved were excluded.[4] The Board's ding is further supported by evidence of respond-t's hostility toward the M. E. S. A. and pref-ence for the Machinists which the Board was en-led to credit. Hilliard J. Sands, respondent's perintendent, admitted that, late in June 1935, replied to a complaint that some of the new men red since the June strike were being solicited to in the Machinists soon after their hiring, con-ary to an understanding between the M. E. S. A. d respondent, with the observation that he pre-rred the Machinists because it was a more con-rvative union (R. 38, 420–421, 217–220). The oard found, upon conflicting testimony, that the sistant superintendent told an employee dis-ssed in June, "I will get you back when we break is union up" (R. 38, 303, 504). After the plant opened on September 3, Garry Sands, respond-t's secretary-treasurer, intimated that the M. E. A. was trying to "break him," and, in refusing

[4] It cannot be contended that respondent excluded the E. S. A. members because they were classified as "old" n at higher wage rates than the men who replaced them. cluded among the 43 M. E. S. A. members not recalled work were 15 "new" employees. Assuming that respond-could, consistently with its obligations under the Act, place its employees because their wages were too high and thout affording them a chance to agree to a reduction, it clear that membership in the M. E. S. A., and not status more highly paid employees, was the reason the men were cluded.

to reinstate one of the M. E. S. A. members, remarked that that union had filed charges with the Board and that the applicant had partaken in the M. E. S. A. picketing of the plant (R. 316, 397, 523, 529). The testimony of Garry Sands, who shaped respondent's labor policies, is pregnant with lack of understanding of and hostility to the discharge of an employer's obligations under the Act (R. 515-517, 529, 540–541).

The evidence, thus summarized, fully supported the Board's findings. In disturbing or ignoring those findings, the court below frustrated the legislative intent, clearly expressed in Section 10 (e), that the appraisal of the evidence and necessary application of the inferential process be made by a specialized administrative agency familiar with the fact situations and problems involved and that the judgment of that body upon the facts be final in the absence of arbitrariness or caprice. In so doing the court usurped the function vested in the Board under the Act and, in exercising the Board's function, ignored evidence upon which the Board rightly relied to support its findings.

III

The failure of the court below to hold that it was an unfair labor practice under Section 8 (3) of the Act for respondent to impose, as a condition of employment, membership in a labor organization with

which it did not have a closed-shop contract, is contrary to the clear terms of the Act, and raises a serious question as to its proper administration.

The facts of the violation are that Linski and Pansky, both M. E. S. A. members, were offered reinstatement by Garry Sands upon condition that they join the Machinists (R. 32–33, 341, 355, 528). On these facts the Board concluded that respondent had violated Section 8 (3) of the Act, making it an unfair labor practice for an employer:

> By discrimination in regard *to hire* or tenure of employment or any term *or condition* of employment *to encourage or discourage* membership in any labor organization; * * * [Italics supplied].

Language could not be clearer.

Notwithstanding the clear violation of the Act, the court below refused to enforce the Board's order, saying (R. 614):

> The respondent suggested during September to two of its old employees that they join the American Federation of Labor as a condition of employment. Since the contract had already been abrogated and the men had been discharged, and since the M. E. S. A. was no longer the exclusive representative of the employees, these acts have no relation to the controversy here.

This disposition of the matter by the court is incomprehensible. We have already shown, pp. 14–15, *supra*, that the men were not yet discharged, and that the M. E. S. A. remained the exclusive

representative of the employees, but even had the contrary been true, it was a plain violation of the statute to offer them employment on condition that they join the Machinists. The so-called abrogation of the contract is wholly irrelevant. To avoid serious confusion and embarrassment in the future enforcement of the Act this Court should, we submit, correct this obvious error.

IV

The questions raised by the decision of the court below as to the proper administration of the National Labor Relations Act are clearly of public importance, and should be passed upon by this Court.

CONCLUSION

Wherefore, we respectfully submit that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

N. A. TOWNSEND,
Acting Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

AUGUST 1938.

U. S. GOVERNMENT PRINTING OFFICE